FILE COPY

FILED
NOV 19 1949
CHARLES ELMORE CROPLE
CLERK

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 414.

LINWOOD L. BRADSHAW, Owner and Master of the Motor Vessel "NETTIE B. GREENWELL", who sues on behalf of himself and the surviving crew of said vessel and as owner of the cargo laden thereon,

Petitioner,

v.

Steamer "VIRGINIA", its Engines, Boilers, Boats, Tackle, Apparel, Furniture and Appurtenances, *in rem*, and CHESAPEAKE AND OHIO RAILWAY COMPANY, A Corporation, Owner, *in personam*,

Respondent.

BRIEF ON BEHALF OF RESPONDENT, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHARLES W. HAGEN,
Counsel for Respondent.

EDWARD R. BAIRD,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX.

PAGE

Statement 1

POINT I—The questions involved have been improperly stated in the petition 2

POINT II—The Court of Appeals properly affirmed the decree on the merits 4

Conclusion 7

TABLE OF CASES CITED:

The Ariadne, 13 Wall. (80 U. S.) 475 . . . . . 2, 3, 5, 6

The City of New York, 147 U. S. 72 7

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 414.

LINWOOD L. BRADSHAW, Owner and Master of the Motor Vessel "NETTIE B. GREENWELL", who sues on behalf of himself and the surviving crew of said vessel and as owner of the cargo laden thereon,

Petitioner,

v.

Steamer "VIRGINIA", its Engines, Boilers, Boats, Tackle, Apparel, Furniture and Appurtenances, *in rem*, and CHESAPEAKE AND OHIO RAILWAY COMPANY, A Corporation, Owner, *in personam*,

Respondent.

BRIEF ON BEHALF OF RESPONDENT, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, The Chesapeake and Ohio Railway Company, in opposition to the petition for a Writ of Certiorari, respectfully shows to this Honorable Court:

The petition should be denied because it raises no novel question of law. The case does not involve any substantial or disputed federal question and it does not affect the public interest or the national welfare. The determination of the District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit that the "Nettie B. Greenwell" was

solely at fault for collision with the "Virginia" is not inconsistent with the decisions of this Honorable Court or with the decisions of Courts of Appeal in other circuits.

POINT I.

The questions involved have been improperly stated in the petition.

Counsel for the petitioner, after inadequately summarizing the facts, state that there are two questions involved: the first, whether the Court of Appeals erred in exonerating the "Virginia" for the alleged failure on the part of her lookout to report the "Greenwell", "a vessel 19.3 feet wide and 72 feet long, with a white cabin, and carrying a lighted lantern on her stern, on a clear and starry night"; the second, whether the Court of Appeals erred in holding that "the burden of showing the lookout on the 'Virginia' could see the 'Greenwell' was on the petitioner, contrary to the holding of this Court in the case of *The Ariadne*", 13 Wall. (80 U. S.) 475 (Petition p. 5).

The District Court for the Eastern District of Virginia, after hearing the witnesses testify in open court, filed findings of fact and conclusions of law and entered a decree holding the "Nettie B. Greenwell" solely at fault and exonerating the "Virginia" for a collision between these vessels, which occurred at 7:30 p. m. on March 11, 1947, in the James River, Virginia (R. pp. 5-11 inclusive). The Court of Appeals for the Fourth Circuit affirmed the decree in an opinion which is officially reported in 176 F. 2d 526.

By reference to the concurrent findings of the lower courts, it becomes evident that the "Nettie B. Greenwell" was being navigated in violation of the statutory rules for navigation in that the "Nettie B. Greenwell" was showing no navigation lights and could not be seen by a vessel approaching on an opposite course, as was the "Virginia". On conflicting testimony, the District Court found as a fact that the only light shown by the "Greenwell" consisted of "a dim white light furnished by an oil lantern on her stern abaft the pilothouse" (Finding of Fact 4; R. p. 6).

The Court of Appeals specifically held that this white light was obscured by the pilothouse and was not visible to anyone on the "Virginia" prior to the collision (R. p. 147).

The action of counsel for the petitioner in stating the first question, without disclosing to this Court that the "Greenwell" was navigating without a light visible to vessels ahead, warrants a denial of the petition.

In their statement of the second question involved, counsel for the petitioner charge that the holding of the Court of Appeals for the Fourth Circuit is in conflict with the holding of this Court in the case of *The Ariadne*. In so doing, counsel fail to state the evidence below accurately and overlook the factual distinctions between this case and *The Ariadne*. The granting of a writ to review the evidence in this case would not be justified.

POINT II.

The Court of Appeals properly affirmed the decree on the merits.

The lower courts concurred in finding that the "Nettie B. Greenwell" was at fault in five respects:

a) Failing to carry proper lights;

b) Failing to maintain a proper lookout;

c) Navigating on the wrong side of the fairway;

d) Failing to obtain the assent of the "Virginia" to a port to port passing;

e) Failing to realize the danger of collision requiring her to reverse and stop (R. pp. 9, 10, 150).

The Court of Appeals characterized the failure to carry proper lights as the most serious fault of the "Greenwell" and virtually the sole cause of the collision. The Court of Appeals then said:

> "It has long been the rule that where one vessel, in violation of statute, is as grossly at fault as was the 'Greenwell' here, that vessel will be held *solely* at fault unless the evidence to establish the fault of the other vessel is clear and indisputable. Cf. *The Pennsylvania,* 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148;" (R. p. 151).

The evidence relating to the navigation of the "Virginia" was then appraised and the Court of Appeals reached the conclusion that there was no clear and indisputable proof that the "Virginia's" lookout was incompetent. The lookout on the "Virginia" had

been stationed behind a windbreak at the stem of the vessel. He was knocked overboard and drowned when, in the collision, the "Greenwell's" mast fell across the bow of the "Virginia" (R. pp. 6, 9, 147, 152, 153).

It is significant to note that the evidence, of the six navigators who testified, clearly established that the "Greenwell" could not be seen from ahead, was not sighted and could not be sighted until the vessels were practically in collision (Foster, R. p. 86; Hudgins, R. p. 99; Wiley, R. p. 133; Kimball, R. pp. 135, 136; Williams, R. p. 137; Hugate, R. p. 139).

Counsel for petitioner, repeating the tactics which were criticized by the Court of Appeals, have again selected isolated bits of testimony to support their argument that the master and the helmsman of the "Virginia" first sighted the "Greenwell" two minutes prior to the collision, or at a distance of approximately three-quarters of a mile (Petition pp. 13-17). The proof is clear and the lower courts both found that the vessels were less than a few hundred feet apart and within seconds of collision before those on the "Virginia" were aware of the "Greenwell" (R. pp. 8, 153).

Counsel for the petitioner lay great stress on the decision of this Court in *The Ariadne,* 13 Wall. (80 U. S.) 475, and offer a table of comparison to establish the proposition that the Court of Appeals, on facts substantially identical to the facts in *The Ariadne,* has reached a conclusion which is in direct conflict with the holding of this Court. In *The Ariadne* a collision occurred on the high seas between the steamer "Ariadne" and the brig "William Edwards". This Court held both vessels at fault, the brig for carrying an insufficient green light, which could not readily be seen, and the steamer for failure of lookout. It clearly

appeared that the steamer approached the brig in the direction most favorable for her lookout to see the hull and sails, and that a vessel without a light could be seen for an eighth of a mile. In commenting upon the conduct of the lookout, this Court said:

> "The brig was not seen by the lookout or any one else on the steamer when she was distant as far as she could have been seen. She was not seen by the lookout at all until his attention was called to her by the mate. She was not seen by either of them until almost at the moment of the collision. It is by no means certain that the lookout would have seen her before he felt the shock but for the inquiry of the mate. He was on the port side, and had been looking, according to his own account, three minutes in the opposite direction. The discovery came too late to do any good. The catastrophe was then unavoidable. For all the purposes of this case there might as well have been no lookout on the steamer. He could have rendered, and it was his duty to render, a service of vital importance, but he rendered none" (p. 478).

Clearly the finding by this Court that the collision could have been avoided by the "Ariadne", if she had seen the lighted brig when it first became visible, differentiates that case entirely from the case under consideration, where the evidence is clear that those on board the "Virginia" could not have seen the unlighted "Greenwell" until seconds before the collision.

Contrary to the contention of petitioner, the courts below cast no burden on the "Greenwell", which was navigating in reckless and unlawful violation of stat-

ute. The courts below did require the "Greenwell", because of its statutory fault, to come forward with clear and indisputable evidence to establish contributing fault on the part of the "Virginia". In so doing, the courts below followed the principle enunciated by this Court. In *The City of New York*, 147 U. S. 72, 85, this Court said:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES W. HAGEN,
Counsel for Respondent.

EDWARD R. BAIRD,
Baird, White & Lanning,
1119 National Bank of Commerce Bldg.,
Norfolk 10, Virginia;

HAGEN & EIDENBACH,
111 John Street,
New York 7, New York;

Of Counsel.